

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

GEORGE LUK, as Trustee, etc., et al.,

Plaintiffs and Respondents,

v.

PAUL R. ALLIONE et al.,

Defendants and Appellants.

B220251

(Los Angeles County
Super. Ct. No. BC411850)

APPEAL from an order of the Superior Court of Los Angeles County,
Abraham Khan, Judge. Affirmed.

Allione & Associates and Paul R. Allione for Defendants and Appellants.

Ryu Law Group and Thomas J. Ryu for Plaintiffs and Respondents.

Defendants and appellants Paul R. Allione (Allione) and Avenue 66 Corporation (Avenue 66) (sometimes collectively referred to as Allione) appeal an order denying their special motion to strike (Code Civ. Proc., § 425.16)¹ a complaint filed by plaintiffs and respondents George Luk, an individual, George Luk, as trustee for the Boylston Trust, and Exchange Square, Inc., dba Southern Cal Construction (sometimes collectively referred to as Luk).²

The essential issue presented is whether Allione and Avenue 66 made a prima facie showing that Luk's causes of action against them arose from any act by them in furtherance of their constitutional right of petition or free speech in connection with a public issue. (§ 425.16, subd. (b)(1).)

Because Allione and Avenue 66 failed to make a threshold showing that Luk's complaint was subject to early scrutiny by way of a special motion to strike, the trial court properly denied their motion.

FACTUAL AND PROCEDURAL BACKGROUND

1. Pleadings.

Luk's operative first amended complaint for damages, filed on or about August 24, 2009, set forth 19 causes of action against some 37 defendants, including Allione and Avenue 66. Allione is an attorney. Avenue 66 allegedly is a Nevada corporation, and is the record owner of a rental property located on North Avenue 66 in Los Angeles. Allione is the principal of said corporation.

As against Allione and Avenue 66, the pleading alleged the following six causes of action: the first, second, tenth and eleventh causes of action (collectively,

¹ All statutory references are to the Code of Civil Procedure, unless otherwise specified.

² An order denying a special motion to strike is appealable. (§ 425.16, subd. (i); § 904.1, subd. (a)(13).)

the RICO claims)³ and the eighteenth and nineteenth causes of action (collectively, the false advertising claims).

Luk alleged in relevant part: the various defendants devised a scheme to defraud investors in two real estate projects. “[I]f anyone questioned the validity of the transaction, [Allione] would use [his] title as attorney to hinder any such challenge.” Further, defendant David Mi and his family hired Allione as their attorney and as attorneys for the projects. “Defendant Allione used his position as an attorney to hide and suppress information from Plaintiffs to further the acts of the enterprise and threatened to sue any limited partner who questioned the acts of David Mi and the Mi Family (Mi) using the litigation against Plaintiff George Luk as an example.”

In other words, Luk’s complaint alleged Allione allegedly intimidated the investors by invoking Allione’s status as an attorney to deter them from questioning Mi’s management decisions.

The first and second causes of action, against Allione and Avenue 66 and other defendants, alleged violations of RICO. Specifically, the defendants devised a scheme to defraud plaintiffs by convincing them to invest money in limited partnerships in order to steal the investors’ money.

The tenth cause of action, against Allione and other defendants, alleged breach of fiduciary duty in the management of the limited partnerships.

The eleventh cause of action, against Allione, Avenue 66 and other defendants, alleged unlawful business acts or practices (Bus. & Prof. Code, § 17200), citing RICO as a predicate statute.

The eighteenth cause of action, false advertising (Bus. & Prof. Code, § 17500), against Allione, Avenue 66 and David Mi, alleged Allione and Mi falsely advertised for business using the name of Luk’s company, Southern Cal Construction (SCC), and

³ RICO is an acronym for the federal Racketeer Influenced and Corrupt Organizations Act. (18 U.S.C. § 1961 et seq.)

falsely stated the address for SCC was 1014 North Avenue 66, which is in fact Allione's property.

The nineteenth cause of action, unfair competition (Bus. & Prof. Code, § 17200), against Allione, Avenue 66 and David Mi, alleged Allione perpetrated a fraud "by obtaining workers compensation insurance coverage through Plaintiff Luk's company, utilizing Plaintiff Luk's company to obtain the construction permits to complete construction on his property, and falsely advertised the address of Plaintiff Luk's company to solicit his own business."

2. Allione and Avenue 66 bring a special motion to strike.

One month after Luk filed the operative first amended complaint, Allione and Avenue 66 filed the special motion to strike which is the subject of this appeal. The motion sought to strike all six causes of action which named Allione and Avenue 66, to wit, the first, second, tenth and eleventh causes of action (collectively, the RICO claims) and the eighteenth and nineteenth causes of action (the false advertising claims). The moving papers contended these causes of action were subject to a special motion to strike (§ 425.6) because they arose from the exercise by Allione and Avenue 66 of their rights of petition and free speech. The moving papers asserted the first amended complaint was "nothing but a malicious attack against an attorney in retaliation for doing nothing more than garden variety legal work – defense of a mechanic's lien. [Luk] then perverts a simple agreement for the removal and reconstruction of a wall – for the benefit of the Garvanza Villa partnership – into some sort of grand conspiracy."

Allione's supporting declaration stated that in November 2008, Luk recorded a mechanic's lien against the Garvanza property in Los Angeles, the Garvanza Villa limited partnership retained Allione to defend the claim, and the first amended complaint was clearly based on Allione's "involvement, as an attorney, *with the litigation previously pending between the parties* regarding Luk's mechanic's lien and communications to the Garvanza Villa partners regarding the same." (Italics added.)

3. *Luk's opposition papers.*

Luk contended Allione and Avenue 66 failed to carry their burden to show the alleged conduct underlying the instant lawsuit arose from defendants' protected activity so as to be subject to a special motion to strike. The fact there had been litigation between Luk and Garvanza Villa Limited Partnership, in which Allione represented the Garvanza partnership, had no bearing on this action, which was unrelated to Allione's conduct in that litigation. Luk contended the first amended complaint alleged Allione assisted David Mi in hiding and concealing from limited partners of Garvanza facts about Garvanza's operations and how they conspired in manipulating Garvanza's operations. The operative complaint was *not* based on Allione's representation of Garvanza in the litigation against Luk. "Therefore, even assuming [Luk's] allegations of [Allione's] conduct[] alluded to [Allione's] protected activities, i.e., representing Garvanza in the litigation, *the principal thrust or gravamen of the cause of action against [Allione] is that [Allione] assisted and helped Defendants David Mi and his family conceal the actual operation and status of Garvanza from its limited partners in furtherance of their fraudulent scheme*, which caused various investors to lose all their investment while preventing these investors from discovering the fraud scheme. [¶] Therefore, [Allione] failed to show that [Luk's] RICO claim against [Allione] is subject to [the] anti-SLAPP statute." (Italics added.)

As for Allione's attack on the false advertising claims, Luk argued Allione's special motion to strike "completely failed to show how the alleged claim arose out of the protected activities or how this claim was related to [Allione's] representation of Garvanza in the pending litigation."

4. *Trial court's ruling.*

On October 26, 2009, the matter came on for hearing. After taking the matter under submission, the trial court issued a minute order denying the special motion to strike. The trial court resolved the motion on the threshold issue that the anti-SLAPP statute was inapplicable to the causes of action being asserted by Luk against Allione

and Avenue 66. Therefore, the trial court did not need to reach the next step of the analysis, namely, whether Luk met his burden to show a reasonable probability of prevailing on his claims.

In denying the special motion to strike, the trial court found “the SLAPP statute is inapposite to the actual causes of action having only a few tangential, evidentiary references to Defendant [Allione] acting as counsel, without purporting to base the suit upon protected litigation activities. [¶] Further, the discovery responses, and declarations, relied upon by moving parties, improperly relate to the asserted lack of merit of the non-attorney allegations, which are not properly considered in ascertaining SLAPP applicability.”⁴

The trial court also denied Luk’s request for attorney fees and expenses (§ 425.16, subd. (c)), on the ground the special motion to strike was not “frivolous or intended to delay, where [Luk’s] pleading contains a few unfortunate references to [Allione’s] attorney work.”

Allione and Avenue 66 filed a timely notice of appeal from the order denying their special motion to strike.

CONTENTIONS

Allione and Avenue 66 contend the RICO claims and the false advertising claims are subject to a special motion to strike, and that Luk had no probability of prevailing on said claims.

DISCUSSION

1. General principles re a special motion to strike.

a. Overview.

As the Supreme Court recently reiterated in *Simpson Strong-Tie Company, Inc. v. Gore* (2010) 49 Cal.4th 12 (*Simpson*), a Strategic Lawsuit Against Public

⁴ Contrary to the trial court’s ruling, in ruling on the threshold issue of whether a cause of action arises from a defendant’s protected activity, a court looks not only to the pleadings but also to the supporting and opposing affidavits. (§ 425.16, subd. (b)(2); *Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 186.)

Participation, or SLAPP, “is a civil lawsuit that is aimed at preventing citizens from exercising their political rights or punishing those who have done so. ‘ “While SLAPP suits masquerade as ordinary lawsuits such as defamation and interference with prospective economic advantage, they are generally meritless suits brought primarily to chill the exercise of free speech or petition rights by the threat of severe economic sanctions against the defendant, and not to vindicate a legally cognizable right.” ’ (Castillo v. Pacheco (2007) 150 Cal.App.4th 242, 249-250, 58 Cal.Rptr.3d 305, quoting Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1296 (1997-1998 Reg. Sess.) as amended May 12, 1997, pp. 1-2.)” (Simpson, *supra*, 49 Cal.4th at p. 21.)

In 1992, “out of concern over ‘a disturbing increase’ in these types of lawsuits, the Legislature enacted section 425.16, the anti-SLAPP statute. (§ 425.16, subd. (a).) The statute authorized the filing of a special motion to strike to expedite the early dismissal of these unmeritorious claims. (§ 425.16, subds. (b)(1), (f).) To encourage ‘continued participation in matters of public significance’ and to ensure ‘that this participation should not be chilled through abuse of the judicial process,’ the Legislature expressly provided that the anti-SLAPP statute ‘shall be construed broadly.’ (§ 425.16, subd. (a).)” (Simpson, *supra*, 49 Cal.4th at p. 21.)

A special motion to strike “involves a two-step process. First, the defendant must make a prima facie showing that the plaintiff’s ‘cause of action . . . aris[es] from’ an act by the defendant ‘in furtherance of the [defendant’s] right of petition or free speech . . . in connection with a public issue.’ [Fn. omitted.] (§ 425.16, subd. (b)(1).) If a defendant meets this threshold showing, the cause of action shall be stricken unless the plaintiff can establish ‘a probability that the plaintiff will prevail on the claim.’ ” (Simpson, *supra*, 49 Cal.4th at p. 21.)

b. *Determining the applicability of the anti-SLAPP statute to a plaintiff’s claim.*

In determining whether the anti-SLAPP statute applies in a given situation, we analyze whether the defendant’s (Allione’s) act underlying the plaintiff’s (Luk’s) cause of action itself was an act by the defendant in furtherance of the right of petition

or free speech. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) The “*principal thrust or gravamen*” of the claim determines whether section 425.16 applies. (*Martinez v. Metabolife Internat., Inc.*, *supra*, 113 Cal.App.4th at p. 188, italics added; accord *Club Members for an Honest Election v. Sierra Club* (2008) 45 Cal.4th 309, 319.)

As used in section 425.16, “ ‘*act in furtherance of a person’s right of petition or free speech under the United States or California Constitution in connection with a public issue*’ includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.” (§ 425.16, subd. (e), italics added.)

c. Standard of appellate review.

Review “of an order granting or denying a motion to strike under section 425.16 is de novo. [Citation.] We consider ‘the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based.’ (§ 425.16, subd. (b)(2).) However, we neither ‘weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant’s evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.’ [Citation.]” (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

2. *Trial court properly found Luk's causes of action against Allione and Avenue 66 were not subject to a special motion to strike.*

a. *Avenue 66 failed to make a threshold showing the anti-SLAPP statute is applicable.*

As a preliminary matter, Avenue 66's arguments merit no discussion. The moving papers below failed to make any showing that Luk's claims against Avenue 66 arose from any acts by Avenue 66 in furtherance of the rights of petition or free speech.

b. *The gravamen of Luk's claims against Allione did not arise from Allione's protected activity; therefore, trial court properly found the anti-SLAPP statute was inapplicable.*

As indicated, the "principal thrust or gravamen" of the claim determines whether section 425.16 applies. (*Club Members for an Honest Election v. Sierra Club, supra*, 45 Cal.4th at p. 319.)

The gravamen of the RICO claims against Allione was that Allione was part of a scheme to defraud investors in limited partnerships, Allione and others breached their fiduciary duty in the management of the limited partnerships, and the RICO violations amounted to an unlawful business practice within the meaning of Business and Professions Code section 17200.

These claims do not arise from any constitutionally protected activity on Allione's part. Allione's representation of the Garvanza partnership in certain litigation, which conduct was in furtherance of the right of petition or free speech, is separate and distinct from these claims by Luk.

Allione relies, inter alia, on Luk's response to special interrogatory No. 5, which asked Luk the following: "Referring to YOUR contention that: 'if anyone questioned the validity of the transaction, Paul Allione and Allione & Associates would use their title as attorney to hinder any such challenge' state in DETAIL all facts that EVIDENCE the truth of that contention." Luk responded: "After the meetings ran by Mr. Allione concerning the limited partnerships, the limited partners

were afraid to question the acts of David Mi for fear of retaliation.” One week later, Luk elaborated in an amended response, stating: “During the December 7, 2009 meeting, Mr. Allione stated that he was the attorney for Garvanza Villa. He told the limited partners that SCC/George Luk had filed a mechanics lien on the property. He falsely told the limited partners that SCC/George Luk was an unlicensed contractor and will take care of SCC/George Luk in court.”

These discovery responses by Luk must be viewed in context. Luk pled Allione “*threatened to sue any limited partner who questioned the acts of David Mi and the Mi Family using the litigation against George Luk as an example.*” (Italics added.) As the trial court found, said claim was not based on Allione’s representation of Garvanza in litigation against Luk. Although Luk referred to protected activity by Allione, namely, Allione’s representation of Garvanza, the gravamen of the cause of action against Allione is that Allione assisted Mi and his family in concealing from the limited partners facts about the operation of the limited partnership, in furtherance of their fraudulent scheme, which caused various investors to lose their investment while preventing them from discovering the fraudulent scheme.

Therefore, Allione failed to establish that Luk’s RICO claims against Allione were subject to a special motion to strike.

Turning to the false advertising claims against Allione, the gravamen of those claims is that Allione falsely advertised for business using the name of Luk’s company, SCC, and falsely obtained “workers compensation insurance coverage through Plaintiff Luk’s company, utilizing Plaintiff Luk’s company to obtain the construction permits to complete construction on his property, and falsely advertised the address of Plaintiff Luk’s company to solicit his own business.”

These claims by Luk did not arise from Allione’s role as an attorney, or Allione’s role as counsel in any litigation. Therefore, the false advertising claims likewise were not subject to a special motion to strike.

c. Conclusion.

We express no opinion as to the merits of Luk's claims against Allione and Avenue 66. We merely hold the trial court correctly determined the anti-SLAPP statute is inapplicable to Luk's claims against these defendants. Therefore, Allione and Avenue 66 were not entitled to early scrutiny of Luk's claims.⁵

DISPOSITION

The order denying the special motion to strike is affirmed. Luk shall recover costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

CROSKEY, J.

KITCHING, J.

⁵ Allione's contention Luk's claims are barred by the litigation privilege (Civ. Code, § 47, subd. (b)) is outside the scope of the issues presented by this appeal. The sole issue before this court is the threshold question of the applicability of section 425.16.